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CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

METRO FUEL LLC, a Delaware limited
liability company,

Plaintiff,

vs.

CITY OF SAN FRANCISCO, a municipal
corporation, COUNTY OF SAN
FRANCISCO, a subdivision of the State
of California, CITY AND COUNTY OF
SAN FRANCISCO, a chartered California
city and county and DOE 1 through DOE
10,

Defendants.

Case No. C07-6067 JSW

**DECLARATION OF DAN MCKENNA IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION**

Hearing Date: November 14, 2008

Time: 9:00 a.m.

Place: Courtroom 2, 17th Floor

Trial Date: October 26, 2009

1 I, DAN MCKENNA, declare:

2 1. I have personal knowledge of the matters stated herein, except for those matters set
3 forth on information and belief, which I believe to be true, and if called to testify, I can and will
4 testify competently as to all matters set forth herein.

5 2. I am employed as the Deputy Bureau Manager, Bureau of Street Use and Mapping, for
6 the Department of Public Works ("DPW") for the City and County of San Francisco ("the City"). I
7 have held this position since June, 2005. Prior to my current position, I was the Superintendent of
8 Parks in the San Francisco Recreation and Parks Department prior to assuming my current position
9 and the Urban Forester with the Recreation and Park Department and the Department of Public
10 Works. I have been employed by the City since 1974.

11 3. As the Deputy Bureau Manager for the Bureau of Street Use and Mapping, I am
12 responsible for permitting and inspecting construction and related activities in the Public Right-of-
13 Way, special projects including undergrounding utilities, installing news racks and the public toilet
14 program.

15 4. Part of my responsibilities is to manage the Automatic Public Toilet and Public
16 Service Kiosk Agreement between the City and JCDecaux United Street Furniture, Inc. ("JCDecaux")
17 and the Pedestal-Mounted Newsrack Agreement between the City and Clear Channel Adshel, Inc.
18 ("Clear Channel").

19 5. I am also responsible for managing staff that review transit shelter installations in the
20 public right-of-way. Bureau of Street Use and Mapping staff review proposed locations and review
21 and approve permits according to DPW guidelines and the San Francisco Public Works Code.

22 6. **Automatic Public Toilet and Public Service Kiosk Agreement.** On August 2, 1994,
23 the City entered into an agreement with JCDecaux "to establish an Automatic Public Toilet Program
24 for the benefit of the residents and visitors to the City and County of San Francisco." A true and
25 correct copy of the Automatic Public Toilet and Public Service Kiosk Agreement is attached as
26 Exhibit A.

1 7. Section 1.06 of the Automatic Public Toilet and Public Service Kiosk Agreement
2 required JCDecaux to install and maintain Automatic Public Toilets in the City.

3 8. Sections 2.01 and 2.02 of the Automatic Public Toilet and Public Service Kiosk
4 Agreement required JCDecaux to obtain all required permits and pay all applicable fees to obtain
5 permits to install each Automatic Public Toilet.

6 9. Section 2.05.A of the Automatic Public Toilet and Public Service Kiosk Agreement
7 stated that "[a] preliminary list of locations for the Automatic Public Toilets in the Initial Phase
8 prepared by the CITY is attached as Appendix B." Appendix B included a list of 27 locations.

9 10. Under section 2.08 of the Automatic Public Toilet and Public Service Kiosk
10 Agreement, the Director of DPW retained the right to approve the design for the Automatic Public
11 Toilets.

12 11. Under section 4.03.B of the Automatic Public Toilet and Public Service Kiosk
13 Agreement, the City retained the right to place informative material on the two displays on each
14 Automatic Public Toilet. No advertising, however, is allowed on the Automatic Public Toilets.

15 12. There are currently 25 Automatic Public Toilets in San Francisco. All of which were
16 permitted and installed before March 5, 2002.

17 13. In return for allowing JCDecaux to install and maintain Automatic Public Toilets in
18 the City, JCDecaux obtained the right to install and maintain Public Service Kiosks in the City.
19 Section 1.01 (M) of the Automatic Public Toilet and Public Service Kiosk Agreement defined "Public
20 Service Kiosks as having two advertising panels and either a newsstand alcove or a public service
21 informational panel.

22 14. Section 1.01 (I) of the Automatic Public Toilet and Public Service Kiosk Agreement
23 limited the placement of Public Service Kiosks to the "Downtown Area," which was defined as "the
24 geographic area of the CITY bounded on the south by the southerly line of Folsom Street, on the west
25 by the westerly line of Van Ness Avenue extended north to the San Francisco Bay, and on the north
26 and east by the shoreline of the San Francisco Bay."

1 15. Section 3.05 of the Automatic Public Toilet and Public Service Kiosk Agreement
2 provided that of the 121 initial Public Service Kiosks, at least 110 were to be located in the
3 Downtown Area.

4 16. There are currently 112 Public Service Kiosks in the City with some advertising
5 panels. Most of the Public Service Kiosks are currently located in the Downtown Area.

6 17. Almost all of the Public Service Kiosks currently in the City were permitted and
7 installed before March 5, 2002. Only two Public Service Kiosks-Castro/18th Streets and
8 Market/Church Streets-have been permitted and installed since March 5, 2002. Both Public Service
9 Kiosks were permitted on December 1, 2005, under Permit Number 05PSK-001. A true and correct
10 copy of Permit Number 05PSK-001 is attached as Exhibit B.

11 18. Section 5.03 of the Automatic Public Toilet and Public Service Kiosk Agreement
12 requires JCDecaux to maintain the Automatic Public Toilets and Public Service Kiosks in a clean,
13 graffiti-free and safe condition. Section 5.05 requires JCDecaux to inspect most Automatic Public
14 Toilet at least once per day (Sundays, Saturdays and bank holidays excepted). For those Automatic
15 Public Toilets on Port Property, JCDecaux is required to inspect each Automatic Public Toilet at least
16 once per day (including Sundays and holidays).

17 19. The San Francisco Arts Commission approved the design for the Automatic Public
18 Toilets and the Public Service Kiosks in February 1994.

19 20. **Pedestal-Mounted Newsrack Agreement.** On June 15, 2002, the City and County of
20 San Francisco entered into a Pedestal-Mounted Newsrack Agreement with Clear Channel "to replace
21 the unsightly clutter of an estimated many thousands of single publication newsracks with 1000
22 pedestal-mounted multi-publication newsracks." A true and correct copy of the Pedestal-Mounted
23 Newsrack Agreement with Clear Channel is attached as Exhibit C.

24 21. Under section 3.1(a) of the Pedestal-Mounted Newsrack Agreement, Clear Channel
25 was required to "install, operate and maintain, on public property up to 1,000 Fixed Pedestal Units in
26 Fixed Pedestal Zones." At least 485 of those Fixed Pedestal Units were allowed to be placed in the
27 "Advertising Zone," which is defined in 1.1(b) of the Pedestal-Mounted Newsrack Agreement.
28

22. Under section 3.1(a) of the Pedestal-Mounted Newsrack Agreement, Clear Channel is required to obtain all required permits and pay all applicable fees to obtain permits to Fixed Pedestal Units.

23. Under Article V of the Pedestal-Mounted Newsrack Agreement, Clear Channel is required to inspect each Fixed Pedestal Unit and Newsrack Box at least one each weekday. In addition, Clear Channel is required to maintain and repair each unit.

24. On October 20, 2003, the San Francisco Arts Commission, Civic Design Review Committee gave final approval to Clear Channel's design for the Fixed Pedestal Newsracks.

25. Sometime in 2002, California enacted legislation that allowed the City to authorize the placement of Pedestal-Mounted Newsracks on Van Ness Avenue.

26. All of the Pedestal-Mounted Newsracks were permitted and installed after March 5, 2002.

27. **Transit Shelter Permits.** Almost all of the existing transit shelters in the public right-of-way were permitted and installed before March 5, 2002. Only the following four transit shelters placed in the public right-of-way have been permitted by DPW and installed since March 5, 2002:

| Permit # | Intersection | Date Issued |
|----------|---|-------------|
| T1567 | Sunnydale/Tomaso | 1/4/2007 |
| T1568 | 42 nd /43 rd and Clement (Midblock) | 3/29/2007 |
| T1569 | Bartlett & Mission/Cesar Chavez | 4/5/2007 |
| T1570 | 19 th Avenue & Lawton | 5/16/2007 |

True and correct copies of these Transit Shelter Permits are attached as Exhibit D.

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28. Some transit shelters are maintained in areas other than the public right-of-way and therefore are not under the regulatory control of DPW.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed on August 28, 2008

By: _____ /s/
DAN MCKENNA

SIGNATURE ATTESTATION

(U.S.D.C. N.D. Cal. General Order 45, Section X.B.)

I obtained the concurrence in the filing of this document from the signatory of this declaration, in compliance with U.S.D.C. N.D. General Order 45, Section X.B.

Dated: August 29, 2008

DENNIS J. HERRERA
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KRISTEN A. JENSEN
THOMAS S. LAKRITZ
VICTORIA WONG
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By: /S/ .
THOMAS S. LAKRITZ

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